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BANDAR UTAMA CITY SDN BHD

v.

BARN THAI RESTAURANT SDN BHD

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HIGH COURT MALAYA, KUALA LUMPUR
KANG HWEE GEE J
[COMPANIES (WINDING-UP) NO: D8-28-71-2008]
22 AUGUST 2008

C ***COMPANY LAW:*** *Winding up - Petition - Statutory notice - Service - Whether petition served in accordance with r. 25 Companies (Winding-Up) Rules 1972 - Whether there was irregularity on service of petition - Onus on respondent to show it was not commercially insolvent - Failure to discharge onus - Whether respondent unable to pay debt*

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This was an application under s. 218(1)(e) of the Companies Act 1965 to wind up the respondent on account of its inability to pay its debt. A statutory notice had been served on the respondent at the respondent's registered office. The debt arose from a judgment of the sessions court. The respondent had not filed any E notice of intention to appear under r. 28 of the Companies (Winding-Up) Rules 1972 nor an affidavit in opposing under r. 30 of the Companies (Winding-Up) Rules 1972. According to the respondent, the copy that was served on the respondent was an F unsealed copy and that the petitioner had failed to comply with the mandatory provision of r. 25 of the Companies (Winding-Up) Rules 1972.

Held (order in terms of the petition):

G **(1)** The petition had been served at its registered office in accordance with r. 25 of the Companies (Winding-Up) Rules 1972. Rule 25 only requires a copy of the petition to be served. It does not mention 'sealed copy.' The process server's affidavit clearly deposed nevertheless that a sealed copy of the H petition was served on the registered address of the respondent. There was therefore no irregularity on the service of the petition. The statutory demand having remained unsatisfied it was therefore to be deemed that the respondent was unable to pay its debt. The onus lay on the respondent

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to show that it was not commercially insolvent and was able to pay its debt every sen to the ringgit. The respondent had failed to discharge that onus. (paras 31, 32, 33, 34, 35, 36 & 37)

Case(s) referred to:
Sri Hartamas Dvpt Sdn Bhd v. MBF Finance Bhd [1992] 1 CLJ 637; [1992] 1 CLJ (Rep) 303 SC ***(refd)***

Legislation referred to:
Companies Act 1965, s. 218(1)(e)
Companies (Winding-Up) Rules 1972, rr. 25, 28, 30

For the petition - Max Yong Boon Swee; M/s Kiru & Yong
For the respondent - Uma Parvathy Thothathri; M/s Uma & Assoc

Reported by Suhainah Wahiduddin

JUDGMENT

Kang Hwee Gee J:

This Is My Oral Judgment: (Ex-tempore)

[1] This is application under s. 218(1)(e) of the Companies Act 1965 to wind up the respondent on account of its inability to pay its debt.

[2] A statutory notice had been served on the respondent on 26 November 2007 at the respondent's registered office.

[3] The debt arose from a judgment of the Sessions Court Shah Alam dated 15 February 2007.

[4] The respondent had not filed any notice of intention to appear under r. 28 of the Companies (Winding-Up) Rules 1972 nor an affidavit in opposition under r. 30 of the Companies (Winding-Up) Rules 1972.

Mr. Max Yong For The Petitioner

[5] The affidavit of service of the process server Encik Mezan bin Idris is as per encl. 3.

[6] The statutory notice is exhibited as "A5" of the petition.

Miss Uma Parvathy Thothathri: (Verbatim)

[7] The petitioner has failed to comply with the mandatory provision of r. 25 of the Companies (Winding-Up) Rules 1972 which reads:

> 25. (1) Every petition shall, unless presented by the company, be served upon the company at the registered office of the company, and if there is no registered office, then at the principal or last known principal place of business of the company, if can be found, by leaving a copy with any member, officer, or servant of the company there, or in case no such member, officer, or servant can be found there, then by leaving a copy at the registered office or principal place of business, or by serving it on such member or members of the company as the Court may direct; and where the company is being wound up voluntarily, the petition shall also be served upon the liquidator (if any) appointed for the purpose of winding-up the affairs of the company. The affidavit of service of petition may be in Form 5 or 6.
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> (2) Where a petition is presented by any person other than the liquidator of the company in relation to a company which is in the course of being wound up, the petition shall be personally served upon the liquidator.
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> (3) A copy of the petition shall also be served upon the Official Receiver and the Registrar of Companies.

[8] The copy that was served on the respondent was an unsealed copy. I have with me now to show the court produced copy which was served to my client.

[9] The covering letter says sealed copy but enclosed was an unsealed copy.

[10] Subsequently there was an application by the petitioner to amend the petition which was served on the respondent on 7 April 2008. The sealed copy of the said application encl. 7 was served on the respondent on 10 April 2008 informing the respondent of the hearing date 23 April 2008.

[11] Messrs Uma & Associates who represented the respondent wrote to the petitioner's solicitor saying no objection to the application to amend and asked them to mention on our behalf and to fix another date and also requested that the amended sealed petition with the new hearing date served to us. But until today we were not served with the amended petition.

[12] See our letter dated 22 April 2008 requesting them to mention and serve the sealed petition.

Reply By Mr. Max Yong: (Verbatim)

[13] We have an affidavit filed that the original petition was served. If there is a dispute then an affidavit in opposition should be filed to raise the facts disputing.

[14] We deny that the original petition had not been served on them. See affidavit of service exh. "MBI1" states clearly that petition was served on the registered address at Suite 1603 on the Company Secretary and the person who received it was Jegajothy a/p Jeganantham duly acknowledged on the service which was returned to the process server.

[15] Paragraph 6 of the affidavit in opposition refers to the unsealed page of the petition which was exhibited as "CAS1" at p. 12. This copy is actually an exhibit of the affidavit verifying petition which need not be sealed as at the point of filing the petition, the petition itself had not been extracted and the affidavit verifying petition had to be filed four days before the petition. So we just exhibited the unsealed copy of the petition for verification of the contents.

[16] We did file an application to amend the petition but this was not carried through and was left as it was although served.

[17] We did take out the Registrar's Certificate after the first hearing date. This was not irregular as the first hearing date was not proceeded with.

Reply By Miss Uma Parvathy Thothathri: (Verbatim)

[18] The sealed petition had not been served on the respondent to date as per exh. "CAS1" in para 6.

[19] My learned friend states that the respondent must prove that it has not been served. In this particular instance the respondent has filed an affidavit in opposition and raised this issue in para 6 and exhibited what was served on the respondent and as evidenced in the exhibit the sealed copy of the same has not been served on the respondent and this allegation had not been replied by the petitioner.

[20] Subsequent to that there is an application to amend the petition which we contend implies the fact a copy of the endorsed petition had not been served on the respondent.

[21] The sealed copy of the petition was served on 10 April 2008 and the hearing date was fixed on 23 April 2008 and we wrote to Kiru & Yong on 22 April 2008 asking them to mention on our behalf and stating that we do not have objection to the said application and to fix another hearing date and serve the amended sealed petition with a new hearing date on us and to date such has not been done.

[22] On 10 July 2008 again we received another application an order for dispensation of the need for advertisement of the petition in the gazette and twice in two local newspapers circulating in Malaysia as to the hearing of the petition on 21 July 2008 and to date the sealed copy of the said application has not been served on us.

[23] There are two applications pending before this Honourable Court.

[24] As per para 13 of the affidavit in opposition there is an ongoing action in Shah Alam High Court Writ Summons No. MT1-22-41-05 which is an action filed by the respondent against the petitioner and amongst others judgement for the loss of actual earning and expected earning and also being the loss of deposit, an interim order that until trial and adjudication of that matter the defendant and or its agents or assign did not in any manner whatever interrupt the plaintiff in its business of running its restaurant and the plaintiff be allowed to suspend payment of rent.

[25] We filed summons in chambers and obtained an order of the High Court on 1 April 2005 and the terms are as follows: that the plaintiff that is the Barn Thai Restaurant deposits into court the sum of RM69,010.20 within a week of the order, the tarik lelong which has been fixed on 4 April 2005 through the Sessions Court Distress Application S3-54-3-2005/application for execution number S3-54-3-2005 be postponed pending the hearing and determination of the summons in chambers. Plaintiff ordered to file reply to the defendant's affidavit and the plaintiff's solicitor undertakes that the plaintiff will not remove any items from the premise.

[26] Subsequent to this order Bandar Utama City Sdn Bhd appealed to the Court of Appeal, the appeal was allowed on 19 January 2007.

[27] The matter has now been fixed for hearing on 18 September 2008 at Shah Alam High Court.

[28] It remains that the petitioner who is the plaintiff in that matter as a matter of good faith has not withdrawn the payment to this court which is RM69,010.20.

[29] In the petition the petitioner has stated in para 9 that the company is deemed to be unable to pay its debt. However, this is untrue as evidenced by the fact of the payment into court the amount of RM69,010.20 on a suit which is subsisting in the Shah Alam High Court.

Findings And Decision

[30] The present application encl. 1 is the original petition which is to be heard. It is not the amended petition (encl. 6) which the petitioner had filed with the court but which was not proceeded with.

[31] It is clear that the petition had been served at its registered office in accordance with r. 25 of the Companies (Winding-Up) Rules 1972.

[32] Rule 25 only requires a copy of the petition to be served. It does not mention "sealed copy". However, it is the practice of this court to issue four copies of the petition with each one affixed with the seal of the court which is embossed on to the copy and may not be clearly discernible as it is colourless.

[33] The process server's affidavit (encl. 3) clearly deposed nevertheless that a sealed copy of the petition was served on the registered address of the respondent. There is therefore no irregularity on the service of the petition.

[34] The statutory demand having remained unsatisfied it is therefore to be deemed that the respondent is unable to pay its debt.

[35] It is to be noted that the petition in this case is based on a statutory demand on a judgment debt awarded by the Sessions Court. The fact that the debt was due is therefore not to be disputed.

[36] The onus lies on the respondent to show that it is not commercially insolvent and is able to pay its debt every sen to the ringgit. See Supreme Court in *Sri Hartamas Dvpt Sdn Bhd v. MBF Finance Bhd* [1992] 1 CLJ 637; [1992] 1 CLJ (Rep) 303 per Gunn Chit Tuan SCJ:

> In this case, the presumption of insolvency arises when the requirements of s. 218(2)(a) of the Act have been satisfied and it is for the company to prove that it is able to pay its debts. In dealing with 'commercial insolvency', that is, of a company being unable to meet current demands upon it, we would respectfully follow the Privy Council in the Malayan Plant case and cite the following observations from *Buckley on the Companies Act* (13th Ed) at p 460:
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> > In such a case it is useless to say that if its assets are realized there will be ample to pay twenty shillings in the pound: this is not the test. A company may be at the same time insolvent and wealthy. It may have wealth locked up in investments not presently realizable; but although this be so, yet if it have not assets available to meet its current liabilities it is commercially insolvent and may be wound up.

[37] The respondent has failed to discharge that onus. This petition has nothing to do with the Shah Alam High Court Writ Summons No. MT1-22-41-05. It is concerned specifically with the judgment of the Sessions Court Shah Alam Summons No. 3-52-2000-2005 ordering the respondent to pay the petitioner mesne

profit with double rent amounting to RM34,505.10 from 16 May 2005 to 15 February 2007, the subject matter of the statutory demand.

[38] There shall accordingly be an order in terms of the petition.